Supreme Court, U.S.
FILED
MAR - 6 2000
CLERK

(3)

No. 99-1345

In The

Supreme Court of the United States

EDWARD DiLORETO,

Petitioner,

v.

BOARD OF EDUCATION OF THE DOWNEY UNIFIED SCHOOL DISTRICT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

GARY ROBERT GIBEAUT
NANCY MAHAN-LAMB
JOHN W. ALLEN
Counsel of Record
GIBEAUT, MAHAN & BRISCOE
6701 Center Drive West,
Suite 611
Los Angeles, California 90045
(310) 410-2020
Attorney for Respondents, Downey Unified School District, Edward Sussman, Betty N. Ferraro, Margo Hoffer

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

26pp

TABLE OF CONTENTS

Page

REASONS FOR DENYING THE WRIT 1

I. CALIFORNIA COURTS HAVE DETERMINED THAT POSTING THE PETITIONER'S SIGN ON THE BASEBALL FIELD FENCE WOULD VIOLATE CALIFORNIA CONSTITUTION ARTICLE I, SECTION 4 3

II. THE NINTH CIRCUIT CORRECTLY CONCLUDED THAT THE BASEBALL FIELD FENCE WAS A NON-PUBLIC FORUM 6

A. RESPONDENTS' CONDUCT WAS REASONABLE 8

B. RESPONDENTS' CONDUCT WAS VIEWPOINT NEUTRAL 9

III. THERE IS NO CONFLICT AMONG THE DECISIONS OF THE DISTRICT WARRANTING REVIEW BY THE UNITED STATES SUPREME COURT 9

IV. THE FEDERAL CONSTITUTION'S ESTABLISHMENT CLAUSE WOULD BE VIOLATED BY POSTING PETITIONER'S SIGN 12

1. Posting the Ten Commandments at the Baseball Field Would Violate the First Prong of the *Lemon* Test ("Secular Legislative Purpose") 14

2. Posting the Ten Commandments at the Baseball Field Would Violate the Second Prong of the *Lemon* Test ("Primary Effect of Advancing Religion") 17

V. CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Abington School District v. Schempp, 374 U.S. 203 (1963) 15, 16

Allegheny County v. American Civ. Liberties Union, 492 U.S. 573 (1989) 13

American Jewish Congress v. City of Chicago, 827 F.2d 120 (7th Cir. 1987) 18

Berger v. Rensseluer Cent. Sch. Corp., 982 F.2d 1160 (7th Cir. 1993) 11, 12, 16

Board of Education of the Westside County Sch. v. Mergens, 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 141 (1990) 16

Brandon v. Board of Education of Guilderland Cent. Sch., 635 F.2d 971 (2d Cir. 1980) 6

Children of the Rosary v. City of Phoenix, 154 F.3d 972 (9th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 1804, 143 L.Ed.2d 1008 (1999) 9

Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transp. Authority, 148 F.3d 2424 (3d Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 797, 142 L.Ed.2d 659 (1999) 9

Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 105 S.Ct. 3449 (1985) 6

DiLoreto v. Board of Education of the Downey Unified School District, 74 Cal.App.4th 267, 87 Cal.Rptr. 791 (1999) 1, 4, 6, 12, 19, 20

TABLE OF AUTHORITIES – Continued

Page

Engel v. Vitale, 370 U.S. 421 (1962) 18

Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985) 17

Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1998)..... *passim*

Jager v. Douglass County Sch. Dist., 862 F.2d 824 (7th Cir. 1989)..... 13

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982)..... 17

Lemon v. Kurtzmann, 403 U.S. 602 (1971)..13, 14, 16, 17, 19

Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038 (5th Cir. 1982)..... 17

Lynch v. Donnelly, 465 U.S. 668 (1984) 13

New York Magazine v. Metropolitan Transit Auth., 136 F.3d 123 (2d Cir.), *cert. denied*, ___ U.S. ___, 119 S.Ct. 68, 142 L.Ed.2d 53 (1998)..... 9

Planned Parenthood of Southern Nevada, Inc. v. Clark County School Dist., 941 F.2d 817 (9th Cir. 1991)..... 6, 9, 10

Planned Parenthood Association/Chicago Area v. Chicago Transit Auth., 767 F.2d 1255 (7th Cir. 1985) 10, 11

Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 115 S.Ct. 2510 (1995)..... 7

Sands v. Morongo Unified School Dist., 53 Cal.3d 863, 281 Cal.Rptr. 34, 809 P.2d 809 (1991) 5

Stone v. Graham, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980)..... *passim*

Widmar v. Vincent, 454 U.S. 263 (1981)..... 14

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONS

California Constitution, Article I, Sec. 4 3

United States Constitution, Amend. 1 .... 11, 12, 13, 19

REASONS FOR DENYING THE WRIT

Respondents respectfully submit that petitioner's Petition for Writ of Certiorari misstates the California appellate court's holding when it upheld the granting of summary judgment in favor of respondents and against petitioner in the state court action arising out of the same factual assertions raised in the federal court action. The Petition for Writ of Certiorari states, at pages 6-7, that the three judge panel of the California Court of Appeals was divided "as to whether posting the Ten Commandments would violate the Establishment Clause of the California Constitution, and no majority opinion was formed on the issue." (Petition for Writ of Certiorari, footnote 2, pages 6-7.)

However, the opinion in *DiLoreto v. Board of Education of the Downey Unified School District*, 74 Cal.App.4th 267, 87 Cal.Rptr. 791 (1999), *Petition for Review Denied* (Justice Kennard and Justice Brown dissenting from the Denial of Petition for Review) clearly stated that the appellate court found that the posting of the Ten Commandments at a public school baseball field would violate the Establishment Clause of Article 1, Section 4 of the California Constitution. Justice Nott wrote for the majority. Justice Zebrowski concurred stating:

> "Respondents acted properly *even if the posting of appellant's sign would not have violated the Establishment Clause*. The baseball field was not a public forum for religious proselytizing. The school was not required to expend funds litigating the issue against whoever might choose to sue." *DiLoreto, Ibid.*, at 283. [Emphasis added.]

The third justice, Justice Mallano, concurred in the result and specifically stated he did not agree that the proposed advertisement containing the Ten Commandments would contravene the Establishment Clause of the California Constitution. However, the majority opinion, in which Justice Zebrowski concurred, clearly states at Section II that the California Constitution's Establishment Clause would be violated by the posting of petitioner's advertisement sign. As petitioner notes in his Petition for Writ of Mandate:

> "There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." Petition for Writ of Certiorari, page 23.

As California has declared that posting petitioner's sign at a public school baseball fence violates *California's* Constitution, respondents' rejection of the sign was reasonable and proper and did not violate petitioner's freedom of speech.

Alternatively, respondents submit that a public high school is a non-public forum for non-students and, under this court's decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1998), respondents acted reasonably in rejecting the sign.

Respondents further submit that there is no conflict among the decisions of the various courts of appeals of the circuits, as this court has previously held that a school is not a public forum under the undisputed facts presented below and no circuit court has held otherwise.

Finally, respondents submit that under this court's ruling in *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980), the Establishment Clause of the First Amendment of the United States Constitution would be violated by the posting of petitioner's sign on the baseball field fence.

For all of the above reasons, respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

I. CALIFORNIA COURTS HAVE DETERMINED THAT POSTING THE PETITIONER'S SIGN ON THE BASEBALL FIELD FENCE WOULD VIOLATE CALIFORNIA CONSTITUTION ARTICLE I, SECTION 4.

As noted in the Petition for Writ of Certiorari, petitioner pursued this case against respondents, as well as Downey Unified School District, in California State courts. Summary judgment was granted in favor of respondents pursuant to the California State Constitution's Establishment Clause set forth at Article I, Section 4. That section states:

> "Sec. 4. Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the state. The Legislature shall make no law respecting an establishment of religion."

On appeal to Division 2 of the Second Appellate District of the California Court of Appeals, the court specifically affirmed the granting of summary judgment

in favor of respondents on the grounds that posting DiLoreto's sign on the wall of the high school baseball field would violate California's Establishment Clause. The court's opinion, offered by Justice Nott, sets forth at Section II the court's grounds for concluding that the Ten Commandments posted on the baseball field fence would violate California's Constitutional prohibition against the establishment of religion.

Justice Zebrowski, noted as "concurring", states:

> "Respondents acted properly *even if the posting of appellant's sign would not have violated the Establishment Clause." DiLoreto, Ibid.*, at 283 [emphasis added].

Clearly, Justice Zebrowski is concurring in the judgment, thus finding that the posting of the sign would violate California's Establishment Clause.

In contrast, Justice Mallano, also listed as "concurring", states:

> "While I concur in the result, I do not agree with Part 2 of Justice Nott's opinion holding that appellant's proposed paid advertisement containing the Ten Commandments contravenes the Establishment Clause of the California Constitution." *DiLoreto, Ibid.*, at 283.

Respondents respectfully submit that the decision of the California Appellate Court concerning the issue of Establishment Clause violation has been clearly set forth at Section II of the appellate court's opinion in *DiLoreto v. Board of Education of the Downey Unified School District, supra*. It is clear that Justice Zebrowski concurred in the majority opinion, just as it is clear that Justice Mallano

did not agree that California's Establishment Clause would be violated by the posting of the sign. Therefore, the opinion complies with Article 6, Section 14 of the California Constitution and states the law of California on this issue.

California courts look to federal cases in interpreting its own Constitution's Establishment Clause; however, "California courts must independently determine its scope." *Sands v. Morongo Unified School Dist.*, 53 Cal.3d 863 at 883, 281 Cal.Rptr. 34, 809 P.2d 809 (1991).

On Petition for Review, the California Supreme Court denied review, with two justices dissenting to the denial of review. As such, respondents respectfully submit that the law of the State of California concerning the State Constitution's Establishment Clause has been determined by California State courts. That determination, *regarding this very case*, is that the posting of Mr. DiLoreto's sign on the baseball field of the high school within Downey Unified School District would violate California's Constitution. Respondents respectfully submit that this court need look no further in denying the Petition for Writ of Certiorari. The petition itself states, at p. 23:

> "There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech."

California law is clear:

> "We conclude that by utilizing its discretion to reject appellants' sign, respondents acted responsibly and within the mandates of the Establishment Clause. Stated another way, if they had accepted the sign and posted it,

respondents would have violated the Establishment Clause." *DiLoreto, Ibid.*, at 278. [Majority Opinion.]

Absent a showing by petitioner that the California courts' interpretation of California's Constitution has resulted in a violation of petitioner's federal rights, respondents respectfully submit that this court should deny the Petition for Writ of Certiorari.

II. THE NINTH CIRCUIT CORRECTLY CONCLUDED THAT THE BASEBALL FIELD FENCE WAS A NON-PUBLIC FORUM

Petitioner sets forth at page 8 of his Petition for Writ of Certiorari the three types of fora created by government for expression on its property, and the ability of government to regulate speech depending on the type of forum created. Respondents do not disagree with this characterization. However, in the context of a public high school, respondents submit that the school is always deemed to be a non-public forum absent "the requisite 'clear intent to create a public forum' *Hazelwood* requires. 484 U.S. at 270, 108 S.Ct. at 569." *Planned Parenthood of Southern Nevada, Inc. v. Clark County School Dist.*, 941 F.2d 817 at 825 (9th Cir. 1991).

As this court noted in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562 (1988), a public school is deemed a *non-public forum* unless the school demonstrated a "clear intent to create a public forum". *Hazelwood, Ibid.*, at 484 U.S. 270, 108 S.Ct. at 569, quoting *Cornelius [v. NAACP Legal Defense Fund]*, 473 U.S. 788 at 802, 105 S.Ct. at 3449-3450 (1985). *See also Brandon v. Board*

of Ed. of Guilderland Cent. Sch., 635 F.2d 971, 980 (2d Cir. 1980).

The Ninth Circuit herein found that the District did *not* intend to designate the baseball field fence as a public forum for expressive activity on the grounds that:

(1) Advertising space on the fence was sold to defray athletic program expenses by raising revenue through the Booster Club, rather than to open a forum for debate;

(2) The District solicited advertisements from local businesses, thereby limiting the content of the forum through its very own solicitation practices;

(3) The District rejected advertisements for alcohol and taverns as well as from Planned Parenthood; and

(4) Respondents testified that they did not personally object to the content of petitioner's advertisement, but were concerned that accepting the advertisement would indiscriminately open the forum to all advertisements regarding personal beliefs (Appendix 13).

Respondents respectfully submit that the District Court, as well as the Ninth Circuit, correctly applied the appropriate legal standards with the undisputed facts to conclude that there was no demonstration that the District intended to create a public forum open to the indiscriminate use by the general public, as required by *Hazelwood*. As such, the District's conduct regarding the speech allowed on the fence need be only (1) reasonable in light of the purpose served by the forum; and (2) viewpoint neutral. *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 at 829, 115 S.Ct. 2510 (1995).

A. RESPONDENTS' CONDUCT WAS REASONABLE

The Ninth Circuit further correctly determined that, as a non-public forum, the conduct of respondents in rejecting petitioner's advertisement containing the Ten Commandments was reasonable. The proposed advertisement clearly raised Establishment Clause *concerns*, whether or not posting the advertisement would ultimately have been held a violation of that Clause: posting the sign would clearly have invited expensive litigation. The fact that respondents were joined by the Anti-Defamation League as amicus curiae in this action strongly suggests that litigation would have occurred had the District posted the sign. As the limited purpose of opening the non-public forum was to raise revenue, and as the posting of petitioner's sign would have invited expensive litigation, such posting would have thereby defeated the entire purpose of opening the forum.

In addition, respondents testified that posting petitioner's advertisement would force the District to open the forum to all expressions of personal beliefs. As the baseball field fence surrounded an area used for physical education classes, the Ninth Circuit correctly held that the District acted reasonably in avoiding changing the baseball field fence from an outer boundary of the baseball field into a forum for contentious debate.

This court has recognized a school district's right to refrain from using its property to "associate the school with any position other than neutrality on matters of political controversy." *Hazelwood*, 484 U.S. at 272, 108

S.Ct. at 570. Thus, respondents acted reasonably in rejecting the sign.

B. RESPONDENTS' CONDUCT WAS VIEWPOINT NEUTRAL

Finally, the rejection of petitioner's advertisement was not viewpoint discrimination. The record establishes that all of the other signs on the fence advertised businesses or charitable organizations. None of the other signs expressed religious views or personal opinion. As such, the rejection of Mr. DiLoreto's sign was viewpoint neutral.

III. THERE IS NO CONFLICT AMONG THE DECISIONS OF THE DISTRICT WARRANTING REVIEW BY THE UNITED STATES SUPREME COURT

Petitioner argues that the decision of the United States Court of Appeals for the Ninth Circuit in the present case, as well as *Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 1804, 143 L.Ed.2d 1008 (1999), and *Planned Parenthood of Southern Nevada, Inc. v. Clark County School Dist.*, 941 F.2d 817 (9th Cir. 1990), are in conflict with holdings of the United States Court of Appeals for the Second, Third and Seventh Circuits. Petitioner cites three cases from those circuits concerning the sale of advertising space on public transit vehicles. (*Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Trans. Auth.*, 148 F.3d 2424 (3d Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S.Ct.

797, 142 L.Ed.2d 659 (1999); *New York Magazine v. Metropolitan Transit Auth.*, 136 F.3d 123 (2d Cir.), *cert. denied*, ___ U.S. ___, 119 S.Ct. 68, 142 L.Ed.2d 53 (1998); and *Planned Parenthood Association/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1255 (7th Cir. 1985).) Respondents respectfully submit that cases concerning the appropriate limitations placed by public transit authorities on bus advertising are inapplicable to the present case.

As noted above, this court in *Hazelwood* held that public schools are presumed a non-public forum absent a clear intent by the school to open the forum. As the Ninth Circuit stated in *Clark, supra*:

> "The court in *Hazelwood* made a number of important statements about the nature of a high school's mission. Its discussion on the measure of school officials' authority over school-sponsored publications informs our analysis of both the nature of the government property involved and the justification for the restrictions imposed." *Clark*, 941 F.2d at 828.

Unlike public transportation, where advertisements are typically seen as not representing the viewpoints of the transit authority, school districts tend to be viewed as giving their "imprimatur" to the views contained in school-sponsored publications and school classrooms. As the *Clark* court noted:

> "When school facilities are not opened up as forums for public expression, *Hazelwood* recognizes the school's broad authority over school-sponsored speech. In light of the nature of the school environment, educators must have the ability to consider the 'emotional maturity of the intended audience' as well as the authority to refuse to 'associate the school with any position

> other than neutrality on matters of political controversy'. *Hazelwood*, 484 U.S. at 272, 108 S.Ct. at 570." *Clark*, 941 F.2d at 829.

Another case from the Seventh Circuit is more on point with the present case than *Planned Parenthood v. Chicago Transit Auth.* cited by petitioner. In *Berger v. Rensselaer Sent School Corp.*, 982 F.2d 1160 (7th Cir. 1993), the Seventh Circuit examined a school district's policy of allowing the Gideons to distribute Bibles at an elementary school on an annual basis. Unlike the present case, the District defended the policy of the Gideons. As in the present case, the argument was made that the District could not restrict the free speech rights of the Gideons by preventing them from coming onto the public school property to pass out Bibles. *Berger*, 982 F.2d at 1165.

The *Berger* court, in rejecting the free speech argument, stated:

> "As in *McCollum*, the Gideons used Rensselaer's tax supported public schools, relying on the state's compulsory public school machinery, to disseminate religious material to fifth graders." *Berger*, 982 F.2d at 1168.

In the present case, a non-member of the Downey Unified School District, Mr. DiLoreto, is also attempting to use tax-supported public schools where students are compelled to attend, to disseminate his religious views. The *Berger* court went on to reject that the Gideons' free speech rights were being violated as follows:

> "Defendant is also wrong as a matter of law that the First Amendment interest in free expression automatically trumps the First Amendment prohibition on state sponsored religious activity.

> The reverse is true in the coercive context of public schools." *Berger*, 982 F.2d at 1168.

After examining various cases where the Establishment Clause took precedence over free speech rights, the *Berger* court noted:

> "In each of these cases, people were kept from exercising very real First Amendment rights to, for example, pray or meditate or proselytize. The conflict between free speech and Establishment Clause interests arises because most religious activity necessarily involves expressive activity, and this expression may be stifled in the government's vigilance to remain neutral toward religion." *Berger*, 982 F.2d at 1168.

There is no conflict between the Ninth Circuit's holding in *DiLoreto* and the Seventh Circuit's holding in *Berger*. Both courts hold that non-students do not have a right to enter public school property and proselytize religious views to a captive audience: the students. As there is no conflict among the circuits, nor within the holdings of this court, respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

IV. THE FEDERAL CONSTITUTION'S ESTABLISHMENT CLAUSE WOULD BE VIOLATED BY POSTING PETITIONER'S SIGN

The Ninth Circuit failed to reach the issue of the Establishment Clause consequences of posting the advertisement. Respondents submit that clear Supreme Court precedent establishes that the sign's posting would have violated the Establishment Clause of the First Amendment.

The First Amendment of the United States Constitution decrees, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . " U.S. Const. Amend I. To meet this requirement, "religion must be a private matter" wholly untouched by state involvement or sponsorship. *Lemon v. Kurtzman*, 403 U.S. at p. 625. The Establishment Clause, "at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.' " *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573, 593-94 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).

The parity between the instant case and *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d at 1919 (1980) is striking. Both involve high schools and Ten Commandments signs. In both cases, a private individual/group would fund the signs. The Ten Commandments signs in *Stone* were to be posted on the interior classroom wall; petitioner in this case seeks a display of the Ten Commandments on the baseball field fence – an outdoor "classroom" for physical education courses and school athletics. (See *Jager v. Douglass County Sch. Dist.*, 862 F.2d 824, 831 (7th Cir. 1989), which holds that religious invocations on the football field violate the Establishment Clause). Further, the Kentucky statute at issue in *Stone* provided that private funding would pay for the Ten Commandments signs, which is akin to petitioner paying for his sign. The language in the Ten Commandments has not changed, and respondents urge that the holding in *Stone* is directly applicable to the case at bar.

A policy will not offend the Establishment Clause if it can pass the following three-pronged test: (1) It has a secular legislative purpose; (2) its principal or primary effect would be neither to advance nor to inhibit religion; and (3) it does not foster an excessive government entanglement with religion. *Widmar v. Vincent*, 454 U.S. 263, 270-275 (1981) (the "*Lemon* test", named after *Lemon v. Kurtzman*, 403 U.S. 602, although it references a body of jurisprudence). If any of the three prongs is not met, the policy violates the Establishment Clause.

Posting the Ten Commandments under the pretext of an "advertisement" on a public school wall would constitute failure of the first and second prongs of the *Lemon* test.

1. Posting the Ten Commandments at the Baseball Field Would Violate the First Prong of the *Lemon* Test ("Secular Legislative Purpose")

The first prong of the *Lemon* test is that the state action must have a "secular legislative purpose". Allowing the Ten Commandments to be posted, as sought by petitioner, would not have a "secular legislative purpose", and accordingly would violate the first prong of the *Lemon* test.

The posting of the Ten Commandments at a school has already been addressed by the U.S. Supreme Court. In *Stone v. Graham*, 449 U.S. 39 (1980) a Kentucky statute requiring the posting of the Ten Commandments was unconstitutional under the first prong of the *Lemon* test

("secular legislative purpose") and thus violated the Establishment Clause. The *Stone* court noted:

> "The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. See Exodus 20:12-17; Deuteronomy 5:16-21. Rather, the first part of the Commandments concerns the religious duties of believers: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. See Exodus 20:1-11; Deuteronomy 5:6-15. This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. *Abington School District v. Schempp* [374 U.S. 203 (1963).] Posting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause."
>
> *Stone v. Graham*, 449 U.S. at 41-42 (1980) [emphasis added] [footnote omitted]

The *Stone* court further noted:

> It does not matter that the posted copies of the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies under the auspices of the legislature provides the "official support of the State . . . Government" that the Establishment Clause prohibits. *Stone, supra,* 449 U.S. at p. 42 (quoting *Schempp, supra,* 374 U.S. at 222; *see Engel v. Vitale,* 370 U.S. 421, 431 (1962)). [emphasis added]

This Court has previously found, in the context of a school prayer case, that there is no meaningful distinction between school authorities actually organizing the religious activity and officials merely "permitting" students to direct the exercises. *Board of Education of the Westside County Sch. v. Mergens,* 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 141 (1990).

Further, a public school may act in a manner that would otherwise violate free speech rights where necessary to avoid breaching the Establishment Clause. *Berger v. Rensselaer Cent. Sch. Corp.,* 982 F.2d 1160, 1169 (7th Cir. 1993).

There is no "secular legislative purpose" to a high school policy allowing the Ten Commandments to be posted by petitioner. Accordingly, the first prong of the *Lemon* test is violated, and for this reason alone, the Establishment Clause prohibits petitioner's Ten Commandments sign from being erected.

2. Posting the Ten Commandments at the Baseball Field Would Violate the Second Prong of the *Lemon* Test ("Primary Effect of Advancing Religion")

To satisfy the second prong of the *Lemon* test, the principal or primary effect can be neither to advance nor to inhibit religion. The *Stone* decision never reached this second prong of the *Lemon* test because a violation of the first prong alone was sufficient to strike down the Kentucky statute.

"The mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-26 (1982). An important concern of the effects test is thus "whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval, of their individual religious choices." *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 390 (1985).

Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982). This symbolic inference is too dangerous to permit. *Id.* The *Lubbock* court noted:

> "As a result of this special concern for the religious neutrality of our educational system, many religious activities occurring in school facilities during school hours have been declared unconstitutional." (Citing *Stone v. Graham*, 449 U.S. 39 (1980) (posting of Ten Commandments in Kentucky public schools unconstitutional). *Id.* at p. 1040-41.

With regard to the issue of the operational hours of the school, it must be remembered that the petitioner's sign would be posted constantly, just like in the *Stone* case, on a space which is deemed a classroom and which is filled, as a matter of course, with impressed and impressionable students.

Further, it cannot be overlooked that this is a public high school where young people are required to attend and to receive an education. As explained by the Seventh Circuit:

> "There may be special problems when the audience is young, captive, or both. Sessions of a legislature may open with prayer, [citation], but sessions of school may not. *Engel v. Vitale*, 370 U.S. 421 [citations]. Children are summoned by law to school; even if told they need not pray, they will be subject to pressure to do so. Children's ridicule and ostracism of their peers for nonconformity may be more compelling than any fine the government could impose. So, too, *Stone v. Graham*, 449 U.S. 39, [citations] (1980), which involved the posting of the Ten Commandments in a classroom, dealt with a captive audience. When the audience can avert its eyes, walk away, or talk back, speakers have greater freedom." *American Jewish Congress v. City of*

> *Chicago*, 827 F.2d 120 (7th Cir. 1987) [nativity scene in city hall violates Establishment Clause].

In this case, the students of Downey High School are a captive audience, unable to avert their eyes when using the subject athletic field during physical education classes or sports programs. Under these circumstances, the freedom of the speaker must be more circumscribed.

Respondents submit that the first and second prongs of the *Lemon* test would be violated by posting petitioner's sign and, as such, would violate the Establishment Clause of the First Amendment. Therefore, the Petition for Writ of Certiorari should be denied.

V. CONCLUSION

In announcing the standard that school officials should retain control over the content of school-sponsored expressive activities, the court in *Hazelwood* stated:

> "This standard is consistent with the oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers and state and local officials, and not of federal judges." *Hazelwood*, 484 U.S. 260 at 274, 108 S.Ct. 562 at 571.

It is this standard, in part, which confirms that respondents in this case did not violate petitioner's constitutional rights by determining that his proposed advertisement was inappropriate for the baseball field fence.

Finally, respondents respectfully submit that the Court of Appeals in California eloquently summarized the situation in its opinion in *DiLoreto v. Board of Education*, 74 Cal.App.4th 267 (1999):

Appellant argues that the California Constitution prohibits respondents from terminating the program. He argues that once respondents 'opened the forum,' they were obligated by the Constitution to continue the program and, if necessary, to litigate with all comers, no matter what the cost in computers, music and drama programs, educational materials, athletic equipment, etc., which might be lost due to the division of funds to finance litigation. Appellant contends that these open-ended costs and losses would have to be born by respondents, and ultimately by the students of respondents' school district, simply because respondents tried to raise funds to refurbish the baseball field. The Constitution does not require such a nonsensical result. The practicalities of this situation gave appellant an effective veto power over the baseball fund raising program. Unfortunately, he chose to exercise that power. Still more unfortunately, he chose to impose litigation costs on respondents when they followed the only reasonable course left open to them. The California Constitution does not require, however, that the school coffers be further depleted with the continuing litigation appellant now desires." *DiLoreto*, 74 Cal.App.4th at 271-272.

Respondents respectfully request that the court avoid further depletion of the District's coffers and deny the Petition for Writ of Certiorari.

Respectfully submitted,

GARY ROBERT GIBEAUT
NANCY MAHAN-LAMB
JOHN W. ALLEN
Counsel of Record
GIBEAUT, MAHAN & BRISCOE
6701 Center Drive West,
Suite 611
Los Angeles, California 90045
(310) 410-2020
Attorneys for Respondents,
Downey Unified School District,
Edward Sussman, Betty N. Ferraro
and Margo Hoffer

March 3, 2000